STATE OF MICHIGAN

COURT OF APPEALS

MARY LANGER, CHERYL GLENN, PAT STRICKLAND, ADELE NODLER, ROBERT G. LICHTMAN, HOWARD GOLDING, CLARE LOEBL, ADELE R. BERLIN, SHIRLETHA BINION, BARBARA A. SHAPIRO, LINDA H. GARVIN, SHEILA GOLDBERG, ADRIENNE SHWEDEL, BARBARA M. BECKER, BARRY R. BERLIN, and ELOISE JOHNSON,

Plaintiffs-Appellants,

v

OAK PARK BOARD OF EDUCATION and OAK PARK SCHOOL DISTRICT,

Defendants-Appellees.

UNPUBLISHED
April 21, 2009

No. 282707
Oakland Circuit Court
LC No. 2006-073650-CD

Before: Beckering, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Plaintiffs, a group of teachers with defendant Oak Park School District, filed this action for breach of contract and promissory estoppel after defendant Oak Park Board of Education voted in June 2005 not to proceed with a previously announced early retirement plan. The trial court granted defendants' motion for summary disposition pursuant to MCR 2.116(C)(10), thereby dismissing plaintiffs' claims for breach of contract and promissory estoppel. Plaintiffs appeal by delayed leave granted. We affirm.

Plaintiffs were employed as tenured teachers or counselors with defendant school district during the 2004-2005 school year. In February 2005, the defendant school board voted to offer an early retirement Employee Severance Plan ("ESP") to eligible employees, subject to the board's right to determine whether the financial impact of the plan would be financially favorable to the school district. Defendants retained a private company, Educators Preferred Corporation (EPC), to prepare documents defining the ESP, and those documents were sent to eligible employees. Plaintiffs are all eligible employees who elected to participate in the ESP. In June 2005, the school board decided not to proceed with the plan. Plaintiffs later filed this action alleging that a valid contract relating to the ESP was established and that defendants breached that contract by failing to implement the ESP. Plaintiffs alternatively sought relief under a theory of promissory estoppel.

The trial court determined that an enforceable contract relating to the ESP was never established. The court alternatively found that even if a contract did exist, the school board's approval was a condition precedent to defendants' obligation to perform under that contract, and because that condition was not satisfied, plaintiffs could not maintain their action for breach of contract. The court also dismissed plaintiffs' promissory estoppel claim, finding that plaintiffs could not prevail on that claim because any reliance on the ESP was unreasonable without it having been approved by the school board.

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court granted defendants' motion under MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

I. Breach of Contract

Plaintiffs argue that the trial court erred in finding that there was no genuine issue of material fact with respect to whether a valid contract relating to the ESP was established. We disagree.

"[T]he essential elements of a valid contract are (1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja*, 187 Mich App 418, 422; 468 NW2d 58 (1991). A "valid contract requires mutual assent or a meeting of the minds on all the essential terms." *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006). A meeting of the minds is decided by applying "an objective standard" by "looking at the express words of the parties and their visible acts, not their subjective states of mind." *Id*. at 454. "A mere expression of intention does not make a binding contract." *Kamalnath v Mercy Mem Hosp Corp*, 194 Mich App 543, 549; 487 NW2d 499 (1992). The burden is on the plaintiff to prove the existence of the contract sought to be enforced. *Id*.

Plaintiffs argue that the school board's February 2005 resolution approving the early retirement offer for eligible employees, together with the written materials they received from the school district and the EPC describing and defining the terms of the ESP, amounted to a definite offer to form a contract for early retirement, which they accepted by completing and returning the necessary forms indicating their election to participate in the plan.

"An offer is a unilateral declaration of intention, and is not a contract." *Kamalnath, supra* at 549. "An offer is defined as 'the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" *Eerdmans v Maki*, 226 Mich App 360, 364; 573 NW2d 329 (1997), quoting Restatement Contracts, 2d, § 24. "A contract is made when both parties have executed or accepted it, and not before." *Kamalnath, supra*.

Plaintiffs principally rely on three documents as constituting the contract. First, they rely on a memorandum from Dr. Alexander Bailey, the superintendent of the school district. However, that memorandum indicates that it merely provides some of the highlights of the plan and refers eligible employees to the plan description for a more accurate or complete explanation of the ESP. As such, the memorandum, standing alone, cannot objectively be viewed as establishing a contract.

Plaintiffs also rely on the plan description that was given to them, which was apparently prepared by either the EPC or the district's administrators. That document expresses the school district's promise "to pay an eligible Employee who participates in the Plan severance pay (or 'ESP™ benefits') as described below, provided that the Employee has fulfilled his/her contractual obligations through his/her effective date of resignation." However, paragraph 2 of the plan description also states that benefits will be payable to "[a]n eligible Employee whose application for ESP™ benefits is accepted," among other requirements. Thus, the description conveys that an application for benefits under the plan must be accepted to be valid. Further, the plan description contains the following limitation:

> The District and the Board reserve the right to evaluate the results of the plan to determine whether or not the financial impact is positive for the district. If it is determined that the results are not favorable, then the District and the Board may deem the plan null and void. If the Plan is deemed null and void by the District, then the Employee shall have the right to rescind his/her resignation from the District.

This portion of the plan description, viewed objectively, makes it clear that implementation of the ESP was subject to defendants' final approval, and thus, the plan description was not a firm offer that would become binding upon each plaintiff 's agreement to participate in the plan.

Plaintiffs also rely on an "Indication of Interest" form that eligible employees were required to sign and return to defendants. That document refers to an eligible applicant's promise to resign from employment in exchange for participation in the ESP, but again contains conditional language specifying, "[m]y resignation under this paragraph will be irrevocable, but will be made void if the District rescinds the Plan on or before May 31, 2005."[1] This conditional language, consistent with the plan description, reinforces the school district's right to reject the plan before it became effective. Thus, an employee's mere submission of that form did not create a binding contract requiring implementation of the ESP before a final decision of the board.

Whether viewed separately, or together, the foregoing documents do not contain an unconditional promise by defendants to proceed with the ESP described in the documents. Moreover, the documents do not meet the definition of an offer because, although defendants sought plaintiffs' agreement to participate in the ESP, plaintiffs' agreement alone clearly was not intended to establish a binding contract. Rather, defendants retained the right to elect not to

[1] The May 31, 2005, date was later extended to June 7, 2005.

proceed with the plan after evaluating its financial impact on the school district and to decide whether to accept each individual offer for early retirement. In other words, the proposal invited plaintiffs to offer to participate in the ESP, but left it to defendants to decide whether to accept each offer.

Plaintiffs rely on additional evidence to argue that even if defendants' ESP offer can be viewed as a conditional one, it was conditioned only on at least 20 teachers agreeing to participate in the plan, because that was the number of participants necessary to make the ESP financially beneficial to the district. It is undisputed that at least 20 teachers elected to participate in the ESP. However, none of the written plan materials refer to a 20-participant minimum in order for the ESP to become binding. The only written reference to this 20-participant number appears in a letter of agreement between the school district and the teachers' union, which provides, in pertinent part:

> 3. The District has the unilateral right to rescind the Plan if, after the close of the election period, it determines that the number of Employees fully participating in the ESP will not provide a sufficient satisfactory financial benefit to the District or may adversely impact the District's educational goals. The District's goal for participation in the ESP is at least 20 Employees, but not more than 35 Employees, and [sic, the] District will not rescind the Plan after May 31, 2005.

We note that plaintiffs submitted only an unsigned copy of this letter agreement. It is unclear from the record whether the agreement was ever executed. Moreover, plaintiffs were not parties to this agreement and it is unclear whether they were aware of the agreement when they decided to participate in the ESP. In any event, the agreement reinforces that the school district retained the unilateral right to rescind the ESP if it determined either that it would not provide a sufficient satisfactory financial benefit to the district or would adversely impact the district's educational goals. The reference to participation of at least 20 employees is expressed only as a "goal," not as a binding limitation on the district's right to elect not to proceed with the ESP.

We also reject plaintiffs' reliance on oral statements by school district administrators or EPC employees regarding the ESP and a 20-participant threshold as a basis for establishing an enforceable contract to implement the ESP once 20 eligible employees agreed to participate in the plan. Plaintiffs submitted evidence that they were orally told that once 20 eligible employees accepted the plan, it was "a done deal," because that was the number of participants needed to make the plan financially beneficial to the school district. The school district's chief financial officer testified in his deposition that the "20 teachers" figure was the number the administration came up with after an economic analysis was performed, but that this figure was not the "board's number."

As previously indicated, this 20-participant number is not contained in the written plan materials. Those materials instead convey the school district's authority to deem the plan null and void if it determines that the results are not financially favorable, but without reference to any minimum or maximum number of participants. At no point did the board agree that once 20 eligible employees accepted the ESP, it would become binding and irrevocable.

Furthermore, regardless of whether the school district's administrators or the EPC were authorized to act on behalf of defendants, any oral representations relating to the ESP could not establish binding contractual obligations. Section 1231(1) of the Revised School Code, MCL 380.1231(1), provides:

> The board of a school district shall hire and contract with qualified teachers. *Contracts with teachers shall be in writing and signed on behalf of the school district by a majority of the board, by the president and secretary of the board, or by the superintendent of schools or an authorized representative of the board.* The contracts shall specify the wages agreed upon. [Emphasis added.]

In *Martin v East Lansing School Dist,* 193 Mich App 166, 178-180; 483 NW2d 656 (1992), the plaintiffs claimed that certain promises were made during pre-contract negotiations regarding salary levels and that they relied on those promises to cease looking for other employment. This Court held that any oral statements could not support a promissory estoppel claim because

> [e]ven if promissory estoppel was not barred by the subsequently written contracts, the implied promises were not in writing. As argued in defendant district's brief, contracts between teachers and boards of education must be in writing and signed by the proper entity. MCL 380.1231 . . . . To allow verbal representations by staff administrators to bind the district without a written contract or action by the board itself would be to ignore the statute.
>
> In summary, we find no error in the trial court's disposition of plaintiffs' express and implied claims in contract. . . . To allow plaintiffs to now proceed in equity with respect to counts II and III on the basis of alleged promises, express or implied, would not only contravene the statutory requirements of a written contract, but would violate the parol evidence rule for contracts. Compare *Edgecomb v Traverse City School Dist,* 341 Mich 106, 118; 67 NW2d 87 (1954). [*Martin, supra* at 180.]

MCL 380.1231 broadly provides that contracts between districts and teachers must be in writing. There is no room for reading this statute as applying only to contracts to hire teachers. Because the alleged contract in this case is between teachers and their school district, MCL 380.1231 requires that it be in writing. Thus, any oral representations made to plaintiffs cannot form the basis for a contract.

The trial court alternatively held that "[e]ven if the documents could be found to be a contract, the condition precedent of board approval of the plan was not met." Plaintiffs argue that the only condition precedent was the signed acceptance by at least 20 eligible teachers willing to participate in the plan.

"A 'condition precedent' is a condition that must be met by one party before the other party is obligated to perform; a 'condition subsequent' is a condition that, if not met by one party, abrogates the other party's obligation to perform." *Archambo v Lawyers Title Ins Corp,* 466 Mich 402, 411-412; 646 NW2d 170 (2002). Stated another way, a condition precedent "'is a fact or event that the parties intend must take place before there is a right to performance.'" *Able*

Demolition, Inc v City of Pontiac, 275 Mich App 577, 583; 739 NW2d 696 (2007) (citation omitted). The "[f]ailure to satisfy a condition precedent prevents a cause of action for failure to perform." *Id*. Moreover, "unless the contract language itself makes clear that the parties intended a term to be a condition precedent, this Court will not read such a requirement into the contract." *Real Estate One v Heller*, 272 Mich App 174, 179; 724 NW2d 738 (2006).

In *Harbor Park Market, Inc v Gronda*, 277 Mich App 126, 128, 131; 743 NW2d 585 (2007), this Court found that a clause in a contract that required the approval of one of the parties' attorneys was a condition precedent. As previously discussed, the written documents in this case informed plaintiffs that defendants reserved the right to evaluate the results of the ESP offer to determine whether the financial impact would be positive for the school district, and if the results were not favorable, defendants could deem the ESP null and void. Thus, to the extent that the documents constituted a valid offer to contract, which plaintiffs accepted, then defendants' right to give final approval to the plan was a condition precedent to defendants' obligation to perform. Moreover, nothing in the written documents indicate that the ESP must be implemented if at least 20 teachers agreed to participate, and plaintiffs may not rely on any oral statements to this effect that may have been made by any administrators or EPC representatives. Accordingly, we find no error in the trial court's determination that even if a valid contract was established, the board's final approval was a condition precedent to defendants' obligation to perform, and because the board rejected the ESP, plaintiffs are not entitled to seek performance of the ESP.

The trial court's decision also refers to the concept of rescission. The court stated:

> [T]he documents at issue state in several different places that the plan is subject to board approval and can be rescinded. For example, in the May 19th memo regarding the Amendments to the ESP Plan, it is stated that a miscommunication needed to be corrected before "the Board can make a final decision as to whether it will go through with it [the plan]." The memo also states that the time for the Board to decide whether to adopt or rescind the ESP is being extended to June 7, 2005 and refers to the employees' "conditional resignations."

A rescission of a contract is not merely a release, but annuls the contract from the beginning and restores the parties to the positions they would have occupied if there had been no contract. *Michelson v Voison*, 254 Mich App 691, 697; 658 NW2d 188 (2003); *Lash v Allstate Ins Co*, 210 Mich App 98, 102; 532 NW2d 869 (1995). Rescission is generally considered an equitable remedy applied to prevent enforcement of a contract. *G P Enterprises, Inc v Jackson Nat'l Life Ins Co*, 202 Mich App 557, 566; 509 NW2d 780 (1993).

We agree that the evidence here does not establish rescission of a contract in the technical sense. Rather, a binding contract never arose in the first instance, or alternatively, any contract that did arise was subject to a condition precedent, i.e., approval by the school board, which did not occur. Similarly, while plaintiffs extensively address whether defendants reserved the right to "rescind" the ESP for any reason whatsoever, their argument is more appropriately directed at the existence of a condition precedent, that being defendants' right to evaluate whether the plan would have a positive financial impact on the school district before it would be obligated to implement the ESP. At that point, any rescission would relate only to the resignation forms

submitted by plaintiffs. In addition, as previously explained, there is no basis for concluding that acceptance of the ESP by 20 eligible teachers was part of the condition precedent.

Accordingly, the trial court did not err in dismissing plaintiffs' breach of contract claim under MCR 2.116(C)(10).

II. Promissory Estoppel

The trial court ruled that plaintiffs failed to prove all elements of promissory estoppel because it was unreasonable for plaintiffs to rely on the ESP before the school board approved it. We agree.

Promissory estoppel consists of the following elements:

> (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. [*Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999).]

Promissory estoppel requires "an actual, clear, and definite promise." *First Security Savings Bank v Aitken*, 226 Mich App 291, 312; 573 NW2d 307 (1997).[2] "[R]eliance is reasonable only if it is induced by an actual promise." *Id*. (citation and internal quotation marks omitted).

> "'A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" . . . Moreover, a promise must be distinguished from a statement of opinion, a prediction of future events, or a party's will, wish, or desire for something to happen. [*Id*. at 312-313 (citations omitted).]

Plaintiffs argue that they justifiably relied on what they were told about the ESP by the district's administrators and the EPC representatives. In particular, they claim that they were told that the ESP would become an irrevocable contract if 20 teachers accepted it, and that they made financial and lifestyle decisions under the belief that they would soon be retiring. But because this 20-figure number is not reflected in the actual plan materials and plaintiffs have not otherwise shown that the board bound itself to this number, plaintiffs cannot demonstrate that their reliance on the administrators' and EPC employees' representations was reasonable. Moreover, as in *Martin, supra* at 179-180, MCL 380.1231(1) precludes reliance on verbal

[2] Overruled in part on other grounds in *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999).

statements to establish an enforceable promise under a promissory estoppel theory. Accordingly, the trial court did not err in dismissing plaintiffs' promissory estoppel claim.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Pat M. Donofrio